

Draft Minutes
Forensic Science Board Meeting
October 31, 2008
DFS Central Laboratory, Classroom

Board Members Present

Mr. Steven Benjamin
Leah Bush, M.D.
Mr. Joseph Bono, Chair
Ms. Linda Carne (Designee for Mr. Robert Jensen)
Mr. Leonard Cooke
Colonel W. Steven Flaherty
Mr. Alan Katz (Designee for Ms. Marla Decker)
Ms. Elizabeth Russell
Mr. S. Randolph Sengel
Mr. James Towey (Designee for Delegate Albo)

Board Members Absent

Mr. Karl Hade
Sheriff F. W. Howard, Jr.

Staff Members Present

Mr. Jeffrey Ban, Central Laboratory Director
David Barron, Ph.D., Technical Services Director
Ms. Guinevere Cassidy, Legal Assistant
Mr. Douglas Chandler, Manager Information Technology Services
Mr. Tom Gasparoli, Public Information Officer
Ms. Michele Gowdy, Department Counsel
Ms. Gail Jaspen, Chief Deputy Director
Mr. Bradford Jenkins, Section Chief Forensic Biology
Ms. Alka Lohmann, Breath Alcohol Section Chief
Mr. Pete Marone, Director, Department of Forensic Science
Ms. Carisa Onorato, Forensic Administrative Specialist
Mr. Steven Sigel, Deputy Director

Call to Order:

Chairman Bono called the meeting to order at 1:03 p.m. Chairman Bono thanked the members of the Forensic Science Board (the Board) for accommodating their schedules and attending the special meeting with the primary purpose being to review the Draft November 1, 2008 Report (November Report) to the General Assembly and the suggested changes by Board members. Chairman Bono apologized for failing to include the November Report on the Agenda of the previous Board meeting on October 8, 2008. He further explained that Director Marone, Chief

Deputy Director Jaspen and Mr. Frank Ferguson, appointed counsel to the Board, were seated at the Board table with him to assist with review and discussion of the November Report.

Adoption of Agenda:

Chairman Bono asked if there were any additions or changes to the draft agenda. There were none. A motion was made to adopt the agenda by Ms. Carne, seconded by Mr. Cooke and adopted without amendment by unanimous vote.

Adoption of Minutes

Chairman Bono asked if there were any additions or changes to the draft minutes from the October 8, 2008 meeting. There were none. A motion was made to adopt the minutes of the October 8, 2008 meeting by Mr. Sengel, seconded by Ms. Carne and adopted without amendment by majority vote. Dr. Bush, Col. Flaherty and Mr. Katz abstained.

Chairman Bono noted that the Public Comment portion of this and future Board meetings has moved from the latter half of the agenda to occurring immediately after the approval of the draft minutes from the previous meeting.

Public Comment

None

Review of Draft November 1, 2008 Report to General Assembly

Chairman Bono thanked Mr. Towey and Mr. Benjamin for their written submissions regarding the October 24, 2008 draft (October Draft) of the November Report. Chairman Bono informed the Board that he requested the assistance of the Department of Forensic Science (DFS) in accurately responding to the issues and requests for information in Mr. Towey and Mr. Benjamin's written submissions. Chairman Bono directed the Board's attention to the November Report related documents in their meeting handout packet. The November Report documents included the October Draft, Mr. Towey's submission, Mr. Benjamin's submission and Chairman Bono's response to Mr. Benjamin's submission.

Discussion by the Forensic Science Board ensued regarding the process the Board would undertake to review and decide upon a final draft of the November Report. The Board decided to review and discuss each of the sections in Chairman Bono's response to Mr. Benjamin's submission. After review and discussion regarding a section's incorporation into the October Draft the text would either be adopted, modified or removed per majority vote via motion or upon agreement without objection by the Board.

Regarding the *AccuTOF-DART Testing Protocol* section of the November Report, Mr. Benjamin moved that the following language be incorporated into the October Draft of the November Report to be submitted to the General Assembly:

93 *AccuTOF-DART Testing Protocol*: The Board accepted the SAC's
94 recommendation to adopt this technology as a screening tool only at DFS. The
95 Department has begun routine use of this technology as a screening tool for
96 controlled substances.

97
98 Mr. Benjamin's motion was seconded by Mr. Cooke and carried by unanimous vote of the
99 Board.

100
101 Discussion by the Board continued regarding the November Report.

102
103 Regarding the *Transition to Capillary Electrophoresis for DNA Analysis* section of the
104 November Report, Mr. Benjamin moved that the following language be incorporated into the
105 October Draft of the November Report to be submitted to the General Assembly:

106
107 In 2005, following the decision of the commercial manufacturer to cease
108 production of the supporting equipment for the DNA testing platform using gel
109 electrophoresis, DFS became aware that it would need to switch its DNA testing
110 platform within a few years. In February, 2006, DFS notified the Board that it
111 was involved in the research of Dr. Richard Mathies' microfabricated capillary
112 array electrophoresis as the replacement DNA platform.

113
114 After extensive research and effort by DFS on behalf of the Mathies' technology,
115 Dr. Mathies determined that the technology was not commercially viable. DFS
116 has determined that it will not be able to use the Mathies' technology as the
117 replacement platform.

118
119 Discussion by the Board ensued. There was no second to Mr. Benjamin's motion. The motion
120 died.

121
122 Mr. Benjamin subsequently moved that the following language be incorporated into the October
123 Draft of the November Report to be submitted to the General Assembly:

124
125 In February 2006, DFS planned to continue use of gel technology for DNA
126 analysis until such time as Dr. Richard Mathies' microfabricated capillary array
127 electrophoresis technology became commercially available as a replacement. In
128 April 2008, DFS was informed that the instrumentation for the microfabricated
129 capillary array electrophoresis would not become available for another 18 months
130 or longer.

131
132 Mr. Benjamin's motion was seconded by Dr. Bush and carried by unanimous vote of the Board.

133
134 Mr. Benjamin also moved that the following language be incorporated into the October Draft of
135 the November Report to be submitted to the General Assembly:

136
137 Capillary eletrophoresis is by far the most commonly utilized DNA technology in
138 the country. The decision to implement the ABI technology may decrease the

total cost of conversion to a new platform because the ABI 3130xl maybe competitive in cost. Because DFS will now be using the same technology as the vast majority of forensic laboratories in the country, the pool of available lateral applicants for DNA examiner positions may increase while the training time for lateral hires may decrease.

DFS has drafted proposed protocols for using the new DNA technology. The proposed protocols will be submitted to the Scientific Advisory Committee for review prior to implementation.

Mr. Benjamin's motion was seconded by Col. Flaherty and carried by unanimous vote of the Board.

Mr. Benjamin next moved that DFS provide the data/information to fill in the blanks of the following language which will then be incorporated into the October Draft of the November Report to be submitted to the General Assembly:

DFS anticipates completing validation of the new DNA platform by _____. Training on the ABI 3130xl will be completed by _____ and examiners will begin conducting casework DNA analysis using the ABI 3130xl by _____. DFS expects the switch-over to the new DNA platform in all regional laboratories in all casework to be completed by _____.

The total equipment cost for implementing the new DNA platform involves the purchase of ____ ABI 3130xl's at a cost of _____ per machine.

Discussion by the Board ensued. There was no second to Mr. Benjamin's motion. The motion died.

Mr. Sengel moved that the following language be incorporated into the October Draft of the November Report to be submitted to the General Assembly:

DFS will continue to provide information to the SAC and the Board on its progress in completing protocols, validation of and training on the new platform and the expected commencement of casework using this technology.

Mr. Sengel's motion was seconded by Col. Flaherty and carried by majority vote of the Board.

Discussion by the Board continued regarding the November Report.

Regarding the *Post Conviction Case Review and Notification Process* section of the November Report, Mr. Benjamin moved that DFS, to the best of its ability, provide the most current data/information as of October 31, 2008, to fill in the blanks of the following language which will then be incorporated into the October Draft of the November Report to be submitted to the General Assembly:

185 _____ cases have been sent to the contracting laboratory for DNA testing. _____
186 additional cases will be sent to the contracting laboratory for DNA testing. _____
187 Certificates of Analysis have been completed for _____ cases
188

189
190 Of the _____ cases in which review of the results has been completed by DFS, the
191 named defendant's DNA has not been identified on the evidentiary samples in
192 _____ instances.
193

194 Hits to individuals who are not named suspects in a case to DNA profiles in the
195 Virginia DNA databank have been made in _____ of the 2167 cases.
196

197 Mr. Benjamin's motion was seconded by Dr. Bush and carried by unanimous vote of the Board.
198

199 Mr. Benjamin also moved that the following language be incorporated into the October Draft of
200 the November Report to be submitted to the General Assembly:
201

202 DFS utilized the entire \$1,422,000 provided by the Governor's Economic
203 Contingency Fund to pay employee wages and the testing of more than 300 cases
204 from February, 2007 to June, 2008, when federal funds became available to pay
205 for testing of certain cases through an award from the National Institute of Justice.
206 DFS is reviewing the data of the cases tested by the independent lab and issuing
207 certificates of analysis. More than 360 additional cases have been sent to the lab
208 for testing since the end of July 2008.
209

210 Mr. Benjamin's motion was seconded by Mr. Towey and carried by unanimous vote of the
211 Board.
212

213 Mr. Benjamin then moved that the following language be incorporated into the October Draft of
214 the November Report to be submitted to the General Assembly:
215

216 In October, 2007, the Board considered notifying convicted defendants by letter,
217 however, at the January 8, 2008, meeting, the Board did not approve the letter
218 drafted for that purpose. The Board rejected a motion to advise the appropriate
219 people in the Commonwealth of Virginia Government about the Notification
220 issue.
221

222 Discussion by the Board ensued. Mr. Benjamin's motion was seconded by Mr. Towey. The
223 motion was defeated by majority roll call vote of 6 – no and 4 – yes: Mr. Benjamin, yes; Dr.
224 Bush, yes; Mr. Cooke, no; Mr. Katz, no; Col. Flaherty, no; Ms. Carne, yes; Ms. Russell, no; Mr.
225 Sengel, no; Mr. Towey, yes; Chairman Bono, no.
226

227 Col. Flaherty moved that the following language be incorporated into the October Draft of the
228 November Report to be submitted to the General Assembly:
229

230 The FSB considered at its January 2008 meeting whether to send notification
231 letters to convicted persons whose case files contained physical evidence suitable
232 for DNA testing and whether to advise the appropriate people in the
233 Commonwealth of Virginia Government about the notification issue. Both
234 proposals failed.

235
236 Discussion by the Board ensued. Col. Flaherty's motion was seconded by Mr. Cooke and carried
237 by majority vote of the Board.

238
239 Mr. Benjamin next moved that the following language be incorporated into the October Draft of
240 the November Report to be submitted to the General Assembly:

241
242 Implementation of the order of the General Assembly was addressed at the May 7,
243 2008, meeting of the Board. A subcommittee was appointed to meet the
244 requirements in the budget language regarding notification.

245
246 The Subcommittee met and formulated a plan for notification using volunteer
247 members of the Virginia State Bar to assist in locating the individuals, verifying
248 conviction information, and making the required notification. The volunteer
249 attorneys would report back to the Subcommittee on the status of each individual
250 and their notification. These efforts would be made at no taxpayer expense.

251
252 A Subcommittee member met with the leadership of the Virginia State Bar, and of
253 each of the other Virginia statewide bar associations.¹ He requested and received
254 their assistance in recruiting attorneys to perform, for the Board, this pro bono
255 project. The efforts of the State Bar and the other bar associations were
256 immediately successful. Attorneys from across the state volunteered to locate,
257 verify, and notify the people who must be reached. The volunteers came from
258 firms in Richmond and Northern Virginia, such as Hunton & Williams, McGuire
259 Woods, Troutman Sanders, LeClair Ryan, Covington & Burling, Dewey &
260 LeBoeuf, and Kelley Drye. Individual volunteers included retired judges, Deputy
261 Commonwealth's Attorneys, law professors, and attorneys with active civil and
262 criminal defense practices.

263
264 By letter dated June 20, 2008, Board Chairman Joseph B. Bono ordered the
265 Subcommittee to cease implementation of the Notification Plan to await the
266 August 6 meeting of the Board.

267
268 Mr. Benjamin's motion was seconded by Mr. Towey. Discussion by the Board ensued. Mr.
269 Benjamin amended his motion by removing the following language of his motion: "By letter

¹ Virginia Association of Black Women Attorneys, Virginia Women Attorneys Association, Hispanic Bar Association, Asian American Bar Association, Virginia Association of Commonwealth's Attorneys, Virginia Trial Lawyers Association, Virginia Bar Association, Virginia Association of Defense Attorneys, Old Dominion Bar Association, Local Government Attorneys of Virginia, Virginia Real Estate Attorneys League, and Virginia Creditors Bar Association.

dated June 20, 2008, Board Chairman Joseph B. Bono ordered the Subcommittee to cease implementation of the Notification Plan to await the August 6 meeting of the Board.” Mr. Benjamin’s amended motion was seconded by Mr. Towey. Discussion by the Board ensued. Mr. Benjamin’s amended motion was defeated by majority roll call vote of 6 – no and 4 – yes: Mr. Benjamin, yes; Dr. Bush, yes; Mr. Cooke, no; Mr. Katz, no; Col. Flaherty, no; Ms. Carne, yes; Ms. Russell, no; Mr. Sengel, no; Mr. Towey, yes; Chairman Bono, no.

The Board broke from meeting proceedings at 2:40 p.m. for a ten minute break.

The Board meeting resumed at 2:54 p.m.

Discussion by the Board resumed regarding the November Report.

Regarding the *Review of Grants* section of the November Report, Mr. Benjamin moved that the following language be incorporated into the October Draft of the November Report to be submitted to the General Assembly:

The award also provides funding for three part-time administrative employees to work a total of 3,750 hours to issue notification letters for an estimated 1,031 defendants to be notified pursuant to Item 408 of the 2008 Budget.

Mr. Benjamin’s motion was seconded by Mr. Towey. Discussion by the Board ensued. Mr. Benjamin’s motion carried by majority vote of the Board with one abstention by Chairman Bono.

Discussion by the Board continued regarding the November Report.

Regarding the *Recommendations* section of the November Report, Mr. Benjamin moved that the following language be incorporated into the October Draft of the November Report to be submitted to the General Assembly:

The Scientific Advisory Committee reviewed the “inconclusive” determinations made by DFS in the DNA testing of the 10% random review of cases from 1973-1988 that contained physical evidence and recommended language for reporting the results which would no longer include the word “inclusive” and provide more clarity. The SAC and Mr. Ban agreed that in 1 out of 9 cases where DNA had been found it was not reported and should have.

Discussion by the Board ensued followed by a vote on Mr. Benjamin’s motion. The motion died due to a tied roll call vote of 5 – yes and 5 – no: Mr. Benjamin, yes; Dr. Bush, yes; Mr. Cooke, no; Mr. Katz, no; Col. Flaherty, no; Ms. Carne, yes; Ms. Russell, yes; Mr. Sengel, no; Mr. Towey, yes; Chairman Bono, no.

Discussion by the Board continued regarding the November Report.

315 Col. Flaherty moved that the October Draft as amended by the Board at its October 31, 2008
316 meeting be adopted as the November Report to be submitted to the General Assembly. Mr.
317 Cooke seconded the motion which carried by majority vote.

318
319 Review of Letter to General Assembly Recommending Legislation relating to Notification
320 Process, as approved on October 8, 2008

321
322 Chairman Bono directed the Board's attention to the draft letter to the General Assembly
323 recommending legislation relating to the notification process. The Board agreed that the letter as
324 drafted should be sent.

325
326 Next Board Meeting

327
328 Chairman Bono informed that the next meeting of the Board will be Wednesday, January 14,
329 2009, to begin at 9:00 a.m.

330
331 Closing Remarks

332
333 Mr. Towey stated that there are two essential issues that needed to be reported on at the next
334 Board meeting. First, Mr. Towey requested a full report detailing the process by which the Board
335 approved the application and later the acceptance of the 2008 Post-Conviction DNA Testing
336 Assistance Program cooperative agreement/grant with the National Institute of Justice (NIJ).
337 Second, Mr. Towey requested that a representative from NIJ appear and report regarding the
338 impact the cooperative agreement/grant on the use of pro bono attorneys in the notification
339 process of the Serology Case Review Project. Mr. Towey stated that he would contact NIJ
340 regarding the request for a report.

341
342 Mr. Benjamin requested that he see the final draft of the November Report prior to it being sent
343 to the General Assembly.

344
345 Chairman Bono adjourned the meeting at 4:04 p.m.